

Issue: Group III Written Notice with Termination (workplace violence); Hearing Date: 11/09/12; Decision Issued: 11/19/12; Agency: DBHDS; AHO: Ternon Galloway Lee, Esq.; Case No. 9951; Outcome: No Relief – Agency Upheld.

## **DECISION OF HEARING OFFICER**

**In the matter of**

**Case Number: 9951**

**Hearing Date: November 9, 2012**

**Decision Issued: November 19, 2012**

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### **SUMMARY OF DECISION**

The Agency had found Grievant engaged in workplace violence and issued Grievant a Group III Written Notice with termination. A Exh. 4. The Hearing Officer (“HO”) has found Grievant engaged in the conduct alleged and therefore upholds the Agency’s Group III Written Notice with termination.

### **HISTORY**

On September 11, 2012, the Agency terminated Grievant for the reason noted above. On October 1, 2012, Grievant timely filed a dismissal grievance to challenge the Agency’s action. On October 23, 2012, the office of Employment Dispute Resolution (“EDR”) assigned the undersigned as the hearing officer to this appeal. A pre-hearing conference (“PHC”) was held on October 29, 2012, and subsequently a scheduling order was issued.

The Hearing Officer scheduled the hearing for November 9, 2012, the first date available between the parties. Prior to commencing the hearing, the parties were given an opportunity to present matters of concern to the Hearing Officer. The Agency reported that one of its witnesses was not present, but that concern was alleviated afterward because the witness did report later during the time allotted for the hearing and testified on behalf of the Agency. The Hearing Officer also admitted the Agency’s exhibits 1 through 9, and the Hearing Officer’s exhibits 1 through 4. Grievant was given an opportunity to submit exhibits but declined to do so.

At the hearing both parties were given the opportunity to make opening and closing statements and to call witnesses. Each party was provided the opportunity to cross examine any witnesses presented by the opposing party.

During, the proceeding, the Grievant represented herself and the Agency was represented by its advocate.

### **APPEARANCES**

Advocate for Agency

Witnesses for the Agency (4 witnesses)<sup>1</sup>

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<sup>1</sup> The Agency elected to not call two individuals it had previously disclosed as potential

Grievant (1 witness, including Grievant)

**ISSUE**

Was the written notice with termination warranted and appropriate under the circumstances?

**BURDEN OF PROOF**

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual (“GPM”) § 5.8(2). A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

**FINDINGS OF FACT**

After reviewing all the evidence presented and observing the demeanor of each witness, I make the following findings of fact:

1. Grievant had been employed by the Agency as a DSA II to provide patient care. (A Exhs. 1, 4; Testimony of Agency Witness 4).
2. There are five departments, or units, within the building/buildings that house the Agency. They are designated as units 1 through 5. Security doors separate the units. Each unit is divided into several sections designated by an alphabet. For example, unit 4 is divided into sections 4A and 4B. Similarly, Unit 5 is divided into sections 5A, 5B, and 5C. (Testimony of Agency Witness 4; A Exh. 9).
3. During the midnight shift that started the evening of August 28, 2012, and ended on August 29, 2012, at 7:30 a.m., a co-worker of Grievant reported to Grievant that Agency Witness 3 had referred to Grievant and other co-workers as a “bitch.” According to the co-worker who made the report to Grievant, Agency Witness 3 was upset about the area she had been assigned to work. (A Exh. 1, pp. 1-2). Agency Witness 3 did use the term “bitch” during the shift. (A Exh. 1).
4. During the subsequent midnight shift that started the evening of August 29, 2012, and ended on August 30, 2012, at 7:30 a.m., Grievant had been assigned to work in Unit 4B. (Testimonies of Agency Witnesses 2, 4 and Grievant; A Exh. 1, pp 1-2). Agency Witness 3 was scheduled to work the same shift, but in a different location, Unit 5C. (A Exh. 1, pp. 1-2). During this shift, a co-worker of Grievant reported to Grievant that Agency Witness 3 continued to talk about Grievant. (A Exh. 1).
5. To resolve what Grievant deemed as a problem with Agency Witness 3 (the

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witnesses.

problem perceived was that Agency Witness 3 was “running her mouth” about Grievant and referring to Grievant as a bitch), Grievant decided to confront Agency Witness 3. Thus, at approximately 7:00 a.m. on August 30, 2012, Grievant left her work station in Unit 4B and walked to Unit 5C where she knew Agency Witness 3 was working. Grievant was visibly angry, speaking loudly, and cursing. Grievant also positioned herself within three to four feet of Agency Witness 3. Specifically, to Agency Witness 3, Grievant said words to the effect of “Keep my name out of your mouth.... Do not go to your car because Grievant and Agency Witness 3 will settle things in the parking lot.” (A Exh. 1, pp. 1,4; Testimonies of Agency Witnesses 1, 2, and 3).

6. Agency Witness 3 was shocked when she was approached and spoken to by Grievant in the above-described manner. (Testimony of Agency Witness ; A Exh. 1).

7. Grievant’s challenge to Agency Witness 3 took place in the patient area of Unit 5C and caused a commotion. At least one employee intervened by coming out of her office and asking Grievant to leave the area. Security was also called in as management perceived an imminent fight between Grievant and Agency Witness 3. (Agency Witnesses 2, 3 and 4).

8. Unit 5C is a great distance from Unit 4B. (Testimony of A Witnesses 2 and 4; A Exh. 9). To walk to Unit 5C, Grievant had to pass through several other units and at least 3 security doors. (A Witnesses1 and 4).

9. The Grievant’s behavior occurred in the patient care area and prior to the shift ending. Others in the work area were affected by Grievant’s actions. (Testimony of A Witness 4).

10. Agency Witness 2 investigated the incident by interviewing relevant witnesses the morning of August 30, 2012, shortly after the incident occurred. The investigator concluded that Grievant engaged in work place violence. (Testimony of A Witness 2; A Exh. 1).

11. Because of Grievant’s behavior, management issued her a Group III Written Notice for work place violence and terminated her employment. (A Exh. 4).

12. Agency Policies 021-014 and 1.80 define workplace violence as follows:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, and intimidating presence, and harassment of any nature such as stalking, shouting or swearing. (A Exhs. 6,7).

13. The Agency Policy Number 1.80-Workplace violence prohibits, among other behavior, the following conduct:

- (i) engaging in behavior that creates a reasonable fear or injury to another person;
- (ii) engaging in behavior that subjects another individual to extreme emotional distress;
- (iii) threatening to injure an individual or to damage property:

(A Exh 7).

14. The Agency has adopted a zero tolerance for work place violence. (A Exh. 6, p. 1).

### **DETERMINATIONS AND OPINION**

The General Assembly enacted the *Virginia Personnel Act, VA. Code §2.2-2900 et seq.*, establishing the procedures and policies applicable to employment within the Commonwealth. This comprehensive legislation includes procedures for hiring, promoting, compensating, discharging and training state employees. It also provides for a grievance procedure. The Act balances the need for orderly administration of state employment and personnel practices with the preservation of the employee's ability to protect his/her rights and to pursue legitimate grievances. These dual goals reflect a valid governmental interest in, and responsibility to, its employees and workplace. *Murray v. Stokes*, 237 VA. 653, 656 (1989).

*Va. Code § 2.2-3000 (A)* sets forth the Commonwealth's grievance procedure and provides, in pertinent part:

It shall be the policy of the Commonwealth, as an employer, to encourage the resolution of employee problems and complaints... To the extent that such concerns cannot be resolved informally, the grievance procedure shall afford an immediate and fair method for resolution of employment disputes which may arise between state agencies and those employees who have access to the procedure under § 2.2-3001.

In disciplinary actions, the agency must show by a preponderance of evidence that the disciplinary action was warranted and appropriate under the circumstances.<sup>2</sup>

To establish procedures on Standards of Conduct and Performances for employees of the Commonwealth of Virginia and pursuant to § 2.2-1201 of the *Code of Virginia*, the Department of Human Resource Management promulgated Standards of Conduct Policy No. 1.60. The Standards of Conduct provide a set of rules governing the professional and personal conduct and acceptable standards for work performance of employees. The Standards serve to establish a fair and objective process for correcting or

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<sup>2</sup> Grievance Procedural Manual § 5.8

treating unacceptable conduct or work performance, to distinguish between less serious and more serious actions of misconduct and to provide appropriate corrective action.

On September 11, 2012, management issued Grievant a Group III Written Notice with termination for the reasons previously noted here. Accordingly, I examine the evidence to determine if the Agency has met its burden.

**I. Analysis of Issue before the Hearing Officer**

**Issue: Whether the discipline was warranted and appropriate under the circumstances?**

**A. Did the employee engage in the behavior described in the Group III Written Notice with removal and did that behavior constitute misconduct?**

The Agency contends Grievant engaged in workplace violence on August 30, 2012. Applicable policy defines workplace violence as follows:

Any physical assault, threatening behavior or verbal abuse occurring in the workplace by employees or third parties. It includes, but is not limited to, beating, stabbing, suicide, shooting, rape, attempted suicide, psychological trauma such as threats, obscene phone calls, and intimidating presence, and harassment of any nature such as stalking, shouting or swearing. (A Exhs. 6,7).

The uncontradicted evidence shows that Grievant left her work station and walked a considerable distance to another work station for the sole purpose of confronting a co-worker whom Grievant believed had been talking about her in a derogatory manner. The evidence also shows that once Grievant reached her destination, staff observed she was visibly angry. Grievant then approached her coworker putting only a three to four feet distance between the two of them. The evidence also shows Grievant in a loud voice directed words to Agency Witness 3. In effect Grievant stated words to the effect of “Keep my [Grievant’s] name out of your mouth and do not go to your car, we will settle this in the parking lot.”

Moreover, the evidence shows that Grievant’s behavior was unexpected and shocked Agency Witness 3. It also took place in the patient care area of Unit 5C and caused such a commotion that one worker on the unit asked Grievant to leave. Further, security was summoned as management believed a fight was about to take place between Grievant and Agency Witness 3.

In sum, Grievant’s actions were threatening, intimidating, and verbally abusive. What is more, they took place in an area where employees perform work related duties. Even more disturbing, Grievant’s actions occurred in a patient care area. Moreover, Grievant’s words suggested a physical altercation would soon ensue in the work place or on its premises. Hence, considering the above, I find Grievant engaged in the conduct

alleged by the Agency and that it violated the Agency's work place violence policy.

**B. Was the discipline consistent with policy and law?**

The evidence shows that the Agency has established a policy to maintain a safe and secure environment. (A Exh. 6, Policy No. 021-014). Further, an employee engaging in work place violence is subject to discipline under the Standards of Conduct. Such discipline can include the issuance of a Group Three Written Notice with termination due to the serious nature of such an offense and the Agency's zero tolerance of it. (A Exh. 7).

The facts of this case indicate that Grievant violated the workplace violence rule by intimidating a coworker and threatening her. The offense was further aggravated by two factors: (i) Grievant left her work station for the sole reason of engaging in the prohibited conduct and (ii) the behavior was carried out in the patient care area.

Grievant acknowledges her actions were not appropriate. But she believes her discipline was too harsh. Considering the evidence, I disagree and find the Agency's discipline was consistent with law and policy.

**II. Mitigation.**

Under statute, hearing officers have the power and duty to “[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with the rules established by the Office of Employment Dispute Resolution [“EDR”].”<sup>3</sup> EDR's *Rules for Conducting Grievance Hearings* provides that “a hearing officer is not a super-personnel officer” therefore, “in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy.”<sup>4</sup> More specifically, the *Rules* provide that in disciplinary, grievances, if the hearing officer finds that;

- (i) the employee engaged in the behavior described in the Written Notice.
- (ii) the behavior constituted misconduct, and
- (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.<sup>5</sup>

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes

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<sup>3</sup> Va. Code § 2.2-3005 and (c)(6)

<sup>4</sup> *Rules for Conducting Grievance Hearings* VI(A)

<sup>5</sup> *Rules for Conducting Grievance Hearings* VI(B)

the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

I have found that Grievant engaged in the behavior described in the Written Notice, that behavior constituted misconduct, and the Agency's discipline was consistent with law and policy. Next a focus on whether the discipline was reasonable is undertaken.

Grievant contends there was no physical fight and that the discipline she received was too harsh.

I recognize that, the Agency has a valid basis for requiring a safe and secure work environment. This case is particularly aggravating because Grievant left her work station during a time she was on duty and supposed to be caring for patients. She walked a considerable distance for the sole purpose of confronting her co-worker. She failed to think about the consequences of carrying out her intentions in the face of the Agency's zero tolerance for work place violence.

All of Grievant's arguments and any evidence submitted to support them, as well as all other evidence have been considered. Having undertaken this deliberation, I am not convinced the Agency acted unreasonably.

### **DECISION**

Hence for reasons noted here, the Agency's discipline is upheld.

### **APPEAL RIGHTS**

You may file an **administrative review** requests within **15 calendar days** from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director  
Departmental of Human Resource Management  
101 N. 14th St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by fax to (804) 371 – 7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure

or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution  
Department of Human Resource Management  
101 N. 14th St., 12<sup>th</sup> Floor  
Richmond, VA 23219

or, send by e-mail to [EDR@dhrm.virginia.gov](mailto:EDR@dhrm.virginia.gov). or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15 calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the Circuit Court in the jurisdiction in which the grievance arose within **30 days** of the date when the decision becomes final.<sup>6</sup>

Entered this 19<sup>th</sup> day of November, 2012.

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Ternon Galloway Lee, Hearing Officer

cc: Agency Advocate  
Agency Representative  
Grievant  
Senior Consultant, Office of EDR

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<sup>6</sup> Agencies must request and receive prior approval from EDR before filing a notice of appeal.